IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *ET AL.*, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, AND CORDOVA CHEMICAL COMPANY OF MICHIGAN IN SUPPORT OF MOTION FOR DIVIDED ARGUMENT

Respondents Aerojet-General Corporation, Cordova Chemical Company of Michigan and Cordova Chemical Company (the "Cordova Respondents") reply to respondent Bestfoods' ("CPC") opposition to motion for divided argument and, in particular, to CPC's suggestion that the Court assign argument responsibility to CPC's counsel. The Cordova Respondents respectfully submit that CPC is in no better position than the Cordova Respondents to argue the merits of the government's proposed test of parent corporation liability under CERCLA §107(a)(2), and that only the Cordova parties are in a position to address all of the issues necessarily raised by the government's request for a reversal of the judgment in favor of Cordova.

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1. Like Respondent CPC, the Cordova Respondents reject the participation and control standard advanced by the United States as a violation of both the policy and text of the statute. (*See* brief of the Cordova Respondents at 1-2, 21-27.) CPC's claim that the Cordova Respondents are aligned with the federal government on this issue is blatantly wrong.[1]

2. CPC's suggestion that it would be "a gross injustice" to allow the Cordova Respondents to argue because the Cordova Respondents continue to assert a basis for liability against CPC misses the point. The Cordova Respondents and CPC have been adverse to each other since CPC started this litigation by suing the Cordova Respondents under CERCLA. CPC has never formally abandoned its claim throughout this litigation that the Cordova Respondents should be liable. To the contrary, CPC asserted this position in the Court of Appeals, *see* CPC C.A. Brief (August 4, 1993) (asserting CERCLA liability against the Cordova Respondents) and filed a Conditional Cross-Petition against the Cordova Respondents in this Court. Accordingly, respondent CPC and the Cordova Respondents are in exactly the same position: both agree that the government's proposed test of liability is incorrect, but both nevertheless maintain a basis for liability against each other on other grounds.

[1] CPC's citation to selected portions of the briefing in the Court of Appeals is beside the point. When the parties briefed this case to a panel of the Court of Appeals, the controlling standard of parent corporation liability in the Sixth Circuit was the "ability to control" standard articulated in *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993). (*See* Aerojet C.A. brief at 31.) Aerojet briefed the case under the controlling authority, and further argued that the same results should obtain under the standard adopted in other circuits at the time of the panel briefing. *Id.* at 32-34. The Cordova Respondents took no position on the issue before the *en banc* Court of Appeals. (*See* Supplemental Aerojet C.A. Brief.) Now that this Court has granted certiorari, the Cordova Respondents have the opportunity to address the question in the absence of controlling legal authority and, like CPC, urge rejection of the government's proposed standard.

3. The Cordova Respondents welcome CPC's suggestion that reversal of the judgment in favor of Aerojet would not preclude Aerojet from arguing below that it should still win on other grounds, but this is not the relief the United States has requested. If this were the result sought by the United States, it would have requested vacatur of the Sixth Circuit decision in favor of Aerojet and remand for resolution of the remaining liability issues. *Cf.* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (6th ed.) at 248, 250 (distinguishing reversal from vacatur in the context of summary disposition). Instead, the government has requested reversal of "the Court of Appeals' judgment with respect to Aerojet's liability as an operator under Section 107(a)(2)." (United States Brief at 48). As described in the Cordova Respondents' brief on the merits, this Court cannot grant the government this relief without resolving critical statutory issues no respondent other than the Cordova Respondents has addressed.[2]

4. The Cordova Respondents have not, as CPC argues, disqualified themselves from presenting oral argument by originally asking this Court to deny certiorari on the claims against Aerojet for a variety of reasons, including those now highlighted by CPC.[3] Obviously, this Court did not find the reasons presented by the Cordova Respondents persuasive, and so the

[2] Moreover, it is entirely proper for the Cordova Respondents to urge before this Court any reason supported by the record in support of the outcome reached by the Court of Appeals. *See e.g., United States v. Arthur Young and Co.*, 465 U.S. 805, 814 n.12, 104 S.Ct. 1495, 1501 n.12 (1984); *Smith v. Phillips*, 455 U.S. 209, 215 n.6, 102 S.Ct. 940, 945 n.6 (1982); *Hutchinson v. Proxmire*, 443 U.S. 111, 122 n.10, 99 S.Ct. 2675, 2981 n.10 (1979); *United States v. New York Tel. Co.*, 434 U.S. 159, 166, n.8, 98 S.Ct. 364, 369 n.8 (1977); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 2775 (1977).

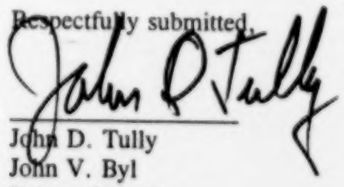
[3] The Cordova Respondents have not reached a settlement with the government.

Cordova Respondents find themselves before this Court. If this Court is now inclined to dismiss the writ as to the claims against the Cordova Respondents, the Cordova Respondents would welcome the Order. Unless and until such an order issues, however, the Cordova Respondents intend to defend themselves vigorously.

Accordingly, the Cordova Respondents again ask the Court to grant the relief requested in their Motion for Divided Argument and, further, to reject the invitation of CPC to intervene in the decision of the respondents as to selection of arguing counsel.

March 6, 1998

Respectfully submitted,



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